



POLICE DEPARTMENT

August 3, 2015

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Daniel Cross
Tax Registry No. 944473
Bronx Court Section
Disciplinary Case No. 2014-12230

The above-named member of the Department appeared before me on June 12, 2015, charged with the following:

1. Said Police Officer Daniel Cross, on or about April 2, 2013 at approximately 0313 hours, while assigned to the 34th Precinct and on duty, in the vicinity of 1455 Saint Nicholas Avenue, New York County, did wrongfully use force against Person A, in that he pushed Person A about Person A's body causing Person A's head to strike a door.

P.G. 203-11 – USE OF FORCE

2. Said Police Officer Daniel Cross, on or about April 2, 2013 at approximately 0313 hours, while assigned to the 34th Precinct and on duty, in the vicinity of 1455 Saint Nicholas Avenue, New York County, did wrongfully use force against Person A, in that he pushed Person A about Person A's body causing Person A's head to strike the ground. *(As amended)*

P.G. 203-11 USE OF FORCE

3. Said Police Officer Daniel Cross, on or about April 2, 2013 at approximately 0313 hours, while assigned to the 34th Precinct and on duty, in the vicinity of 1455 Saint Nicholas Avenue, New York County, did wrongfully use force against Person A, in that he punched Person A about Person A's face. *(As amended)*

P.G. 203-11 USE OF FORCE

The Civilian Complaint Review Board (CCRB) was represented by Nicole Junior, Esq. Respondent was represented by Michael Martinez, Esq.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty of the misconduct charged in Specifications 1, 2, and 3.

SUMMARY OF EVIDENCE PRESENTED

This case involves an arrest at the Lucky Seven Tapas Bar in the early morning hours of April 2, 2013. It is undisputed that Respondent and Sgt. Visar Marku were on routine patrol when they were flagged down regarding a fight that had occurred inside the bar at 1455 Saint Nicholas Avenue in Manhattan. Upon entering the location, the officers were directed to where security already was holding one of the participants in the altercation, Person A. The Sergeant handcuffed Person A, and eventually had Respondent escort the prisoner out of the bar.

There is some dispute as to the pivotal details of what exactly happened as Respondent escorted Person A out of the bar. Person A did not appear to testify at the trial; Counsel for CCRB produced documentation verifying that Person A had been served with a subpoena to appear, but he disregarded that subpoena. In his absence, Diana Murray, an Assistant Supervisor of Investigators with CCRB, testified as to her interview of

Person A. Through Ms. Murray CCRB introduced into evidence an audio copy of Person A's interview. (CCRB Exs. 1A and B).

In his CCRB interview, Person A offered his version of the events of April 2, 2013. According to Person A, he was at the Lucky Seven Tapas Bar with friends when an altercation started. He stated he was not drinking alcohol or smoking that evening. Person A claimed that he heard a commotion in the bar, and when he stood up to look, he "was struck from behind." Person A insisted that he did not throw anything and did not partake in the altercation. Nevertheless, security grabbed him and held him on the floor until the police came.

Once police arrived, Person A was handcuffed. According to Person A, as Respondent was escorting him out, Respondent pushed Person A's face into the double doors. Person A stated that Respondent then "swept" him to the ground, causing Person A to bang the back of his head hard on the floor. Person A said that he was then punched in the face two times, though he wasn't sure if it was only Respondent who punched him or another officer as well. The officers continued to tell him to "shut the fuck up" as they picked him up and brought him to the car.

Person A was taken to [REDACTED] Hospital, where he was treated for the injuries to his head. CCRB moved the medical records into evidence. (CCRB Ex. 3) The records reveal that the patient received staples in his scalp for a small head laceration, and also had abrasions to his head and a swollen lip. There is an indication that the patient had been drinking alcohol; the records note that though he was intoxicated, he was able to answer questions. In the records, Person A describes being in a

fight at a bar, and states that he does not know how he received the laceration on his scalp.

It also was elicited from Ms. Murray's testimony that Person A has several prior convictions. From her search of his criminal history, Ms. Murray learned that Person A has convictions for Criminal Sale of a Controlled Substance, Menacing, Trespassing, and Disorderly Conduct. (Tr. 46)

Respondent, who has eight years on the force, testified that when he and Sgt. Marku arrived at the bar, three security guards were restraining Person A. According to Respondent, Person A appeared "intoxicated and belligerent" as security attempted to keep him under control. (Tr. 93) The sergeant rear-cuffed Person A, and Respondent stayed with the prisoner while the Sergeant continued to investigate inside the bar. Respondent smelled a strong odor of alcohol on his prisoner's breath. (Tr. 105) Person A continued to wiggle around, and Respondent observed a sandwich-sized bag of marijuana on the ground just below the prisoner's hands. Person A denied that it was his marijuana, but Respondent was skeptical of this denial in light of his observations, and as a result his "suspicion was raised" regarding his prisoner. (Tr. 94)

After Sgt. Marku returned, the officers lifted Person A to his feet and began to escort him out of the bar. Respondent testified as to his safety training in such situations: once the prisoner is in his control and custody, his duty is to get the handcuffed prisoner to the patrol car "as easy as possible." Respondent added that in order for this to happen safely, it's important that the prisoner be cooperative and follow instructions. (Tr. 98-99) His goal here was to remove Person A "as fast as possible without hurting him or having him hurt me." (Tr. 102)

As Respondent was walking his prisoner toward the exit, a blond haired woman, identified as Person A's girlfriend, "came close in (the officer's) personal area," which raised further safety concerns for Respondent. (Tr. 98) Respondent testified that as he continued to guide Person A toward the door, Person A abruptly turned toward Respondent, they bumped, and the force of that collision combined with Respondent's forward momentum, propelled them both through the double-doors and onto the ground. (Tr. 96-7) Respondent denied intentionally pushing his prisoner's head into the doors. Respondent also noted that the fact that he and the prisoner were both large men contributed to their falling hard to the ground; he estimated himself at 6'8", 230 pounds, and Person A about 6'3", 240-250 pounds. (Tr. 99) After the fall, Respondent picked the prisoner back up and continued on to the car; Respondent denied ever punching Person A. (Tr.101)

On cross-examination, Respondent acknowledged that originally he did not recall he and Person A falling to the ground; it was only after IAB showed him video footage of the incident approximately two years later that his memory was refreshed. (Tr. 109-10) He also testified that upon first encountering Person A, he did not notice any injuries or blood on his prisoner; only after they were back at the precinct did Respondent notice Person A's lacerations and blood on the back of his head. (Tr. 111-13) On redirect, Respondent added that he was present for an interview of Person A by an Assistant District Attorney, where Person A told the prosecutor that he had been struck in the back of the head in the club prior to being arrested. (Tr. 116) Sergeant Visar Marku testified that he actually did notice blood on Person A's face and head when they first arrived at the bar. (Tr. 80) Otherwise, the Sergeant essentially corroborated Respondent's description

of events, including how an apparently intoxicated Person A continued to struggle as they were escorting him out of the bar, which caused the fall into the vestibule area. (Tr. 84)

Aside from the testimony, there were several additional pieces of evidence to aid the Court in evaluating the incident. CCRB introduced video footage from the bar showing Respondent escorting Person A to the exit. (CCRB Ex. 2) That video, predictably, was interpreted differently by each side. CCRB argues that it shows that Respondent intentionally pushed Person A's head into the door and then "slingshot" him to the ground. Counsel for Respondent counters that Person A was being non-compliant, and as a result he and Respondent fell off-balance through the door.

Also in evidence is video footage from the original bar altercation. (Resp. Ex. C) That footage shows Person A turning his chair to face and stare at another bar patron. Once that patron's back is turned, Person A is seen reaching for some sort of bucket and violently smashing the other individual from behind in his head area. Person A follows that attack by at least twice throwing certain items toward the individual; as he throws one of those items, sparks of fire appear to fly up in the air. Although there is no audio to accompany the footage, Person A does appear to be the aggressor in the altercation, in complete contrast to how he described it to Ms. Murray of CCRB (Tr. 55)

Further, Respondent introduced into evidence a written statement by Person A dated April 2, 2013. (Resp. Ex. A) The statement, written on IAB letterhead, states, "I'm not 100 percent sure that the officer was the person that caused my head injury." The statement is signed by Person A, and witnessed by a Sergeant who signed the document as well.

FINDINGS AND ANALYSIS

N.Y.P.D. officers are responsible for using the proper amount of force appropriate to the circumstances. At the scene of an incident, all members of the service are required to use the "minimum force" necessary for the situation. Patrol Guide section 203-11 provides that excessive force will not be tolerated.

Here, CCRB alleges that Respondent wrongfully used excessive force against Person A as he escorted Person A out of the bar. Without in-court testimony from Person A, CCRB relies primarily on hearsay evidence introduced through Person A's CCRB interview, the medical records of his injuries, and the video footage of Respondent escorting Person A from the bar. Hearsay evidence is admissible in an administrative tribunal, although it certainly is preferable to have first-hand, in-court testimony from an actual witness, where opposing counsel are afforded an opportunity to confront the witness, and the witness' demeanor on the stand can be considered. A case may, though, be proven with hearsay evidence, provided it is found to be sufficiently reliable and probative on the issues to be determined. See *Ayala v. Ward*, 170 A.D.2d 235, 565 NYS2d 114 (1st Dept 1991); *In the Matter of 125 Bar Corp v. State Liquor Authority of the State of New York*, 24 NY2d 174, 299 NYS2d 194 (1969).

Here, the Court does not credit Person A's account of the incident. Person A, himself, did not appear to testify, and there is extensive evidence that contradicts his statement to CCRB. Most glaring is Person A's complete fabrication as to the original altercation at the bar: his description of events to the CCRB investigator, where he insisted he did not throw anything or partake in the altercation, other than being hit in the back of a head with an object, is completely belied by the video footage of the incident.

It is Person A, himself, who is seen striking another individual in the head from behind with some sort of bucket, without any evidence of physical provocation. It is Person A, himself, who is seen throwing additional items from a table at other individuals. Despite his efforts to minimize his culpability, clearly Person A was an active participant, and likely the aggressor, in the fight that occurred in the bar.

Similarly, Person A claimed that he was not drinking alcohol or smoking that evening, but he shows signs of intoxication on the video. Both officers testified he appeared intoxicated, and the medical records indicate he had been drinking as well. Again, Person A's distortion of the truth makes it extremely difficult to credit his account of events inside the bar. Accordingly, the Court finds Person A's hearsay statements to be unreliable and insufficient to sustain CCRB's burden.

In the statement he wrote on April 2, 2013, Person A claimed not to be sure who caused his head injury, further undermining CCRB's efforts to prove their case by a preponderance of the evidence. Sergeant Marku testified that Person A already was bleeding when the officers first arrived, suggesting that the injury occurred during the bar fight. Respondent, though, did not recall seeing any such injuries upon their arrival, which, combined with the video footage of the incident, suggests that at least part of Person A's injuries may have been sustained as he fell to the ground in the vestibule area.

However, even if such is the case, the Court still is not persuaded that CCRB has met its burden of proving that Respondent used excessive force against Person A. Respondent was detailed and consistent in his testimony on the stand. The Court finds that Respondent testified credibly when he stated that he did not deliberately thrust

Person A's head into the door, that he did not deliberately throw him to the ground, and that he did not punch him.

Moreover, the video footage in evidence supports Respondent's version of events: Person A seems unsteady on his feet, possibly from being intoxicated, and appears uncooperative as well as he tries to move in a different direction than the exit doors. The blond-haired woman, Person A's girlfriend, moves close to Respondent, and it appears some words are exchanged as Respondent gestures with his hand for her to move away. As they approach the door, Person A does turn abruptly toward Respondent, or someone else, which results in his back facing the exit door. It appears that Respondent continues to guide a resistant Person A toward the door, intent on getting his prisoner out of the bar as quickly as possible. Person A's upper shoulder-blade area seems to strike the double door, and as Respondent tries to maintain control of his prisoner they appear to lose balance and fall to the ground in the vestibule area. The footage does not convince the Court that Respondent was deliberately smashing Person A into the door and to the ground; rather, it appears to be more a result of Respondent trying to get an uncooperative prisoner out of the bar to a more secure location. The video does not clearly show what happens once they are on the ground, though the Court does not see any evidence in the footage of Person A being punched.

To be sure, Respondent did use a minimal level of force in escorting Person A from the bar, and Person A did appear to fall hard to the ground; but this result was not due to any misconduct on the part of Respondent. Rather, it appears that Respondent acted reasonably, using the minimum amount of force necessary under the circumstances,

as he attempted to escort an uncooperative prisoner safely and efficiently to the patrol car.

Given the totality of the circumstances that Respondent faced inside the bar that evening, the Court finds that Respondent acted as a reasonable officer would have acted in that situation. The Court is not persuaded that CCRB has met its burden of proving, by a preponderance of the evidence, that Respondent used excessive force on Person A in violation of Patrol Guide 203-11. Accordingly, I find Respondent Not Guilty on each of the three specifications.

Respectfully submitted,



Jeff S. Adler

Assistant Deputy Commissioner – Trials

APPROVED

SEP 22 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER